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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JAMES L. BREEDEN,

Petitioner,

v.

E. L. BOOKER, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

I.

Whether an accused receives a fair trial when the prosecution knowingly and willfully uses false evidence, conceals evidence in its possession which directly conflicts with the prosecution's theory of the case, which supports the defense, and which calls into serious question the validity of key prosecution testimony.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. _____
JAMES L. BREEDEN,

Petitioner, v.

E. L. BOOKER,
WARDEN
VIRGINIA STATE PENITENTIARY

Respondent.

PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unpublished. It is found in Record Opinion No. 87-6053 decided 26 January 1988. The opinion of the District Court is an unpublished opinion which is not officially reported. (App. B).

JURISDICTION

The judgment of the court of appeals was entered on 26 January 1988. The jurisdiction of this court is invoked under 28 U.S.C. § 1254 and 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI of the United States Constitution reads as follows:

In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section 1 to the United States Constitution reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunity of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

I. STATEMENT

This case involves the concealment and withholding of critical exculpatory evidence by the prosecution in Fairfax County, Virginia's most significant criminal trial in twenty years. The crime was an armed robbery of a fast food restaurant during which four people were killed and one, Julie Nakpodia, was severely wounded. Evidence which the prosecution concealed and withheld conflicted with their presentation of how the crime was committed; revealed the existence of a criminal agent other than

Petitioner; discredited the evidence of the only witness placing Petitioner at the scene of the crime; and impeached the credibility of key prosecution witnesses.

A. The prosecution withheld evidence at trial which conflicted with its claimed manner of entry.

1. Trial: At trial, the prosecution's case depended upon entry being gained through a rear kitchen door after closing.¹ This door was right next to a pot washing sink.

¹ The defense had an alibi which established that Petitioner was elsewhere from a time before, until shortly after, closing. In final argument, the prosecution told the jury that they could believe the alibi because the assailant had entered through the back door after closing at a time not covered by the alibi.

2. Withheld Evidence: (a)

Statements given to the police by Mrs. Porter but withheld by the prosecution until long after trial revealed that an employee, Patrick Marcil, was next to the rear door cleaning pots and pans at the supposed time of "entry". She and her husband had been conferring with the manager in his office until shortly after closing and saw that Mr. Marcil had begun his work at that location at closing time.²

(b) At trial, the defense only knew that Mr. Marcil was at the point of "entry" when another employee, Richard Morefield, discovered the assailant

² Mrs. Porter's statement was concealed from the defense at trial. The police had also told witnesses not to discuss this case with the defense. When that was uncovered, the Court ordered it stopped but no witness would talk to the defense.

hiding in the restroom. It was not known at trial that he had been at the back door the entire time from closing until the discovery of the assailant. The defense had not known where he was prior to the assailant being discovered.

(c) Significantly, the trial evidence showed that after the assailant was discovered and had gathered the other employees together, he was not aware that Mr. Marcil was still working right next to the back door which the prosecution claimed he had just entered.

3. The Effect of the Withheld Evidence: Adding the evidence the prosecution withheld about Marcil's location to the evidence known at the time of trial would have defeated the prosecution's theory of entry through the rear kitchen door after closing. The

assailant could not have entered without Mr. Marcil noticing him. Even if he had somehow gotten by Marcil unseen, he certainly would have known of Marcil's presence. He would not have asked if anyone else was present after gathering the other employees together in the front of the establishment;³ yet, that is exactly what he did. He had no idea

³ The Court in the federal habeas case underlying this appeal erroneously thought that this previously concealed evidence about employee Marcil being at the back door from closing until employee Morefield discovered the man in the restroom added nothing new to the case. The defense had argued at trial that the man could not have entered after closing because of Marcil. What the withheld evidence established, however, was proof that the intruder would have to get past Marcil if entering after closing because he was actually there the whole time; not just at the end. At trial the defense could only argue a theory. The prosecution had withheld the actual proof establishing the defense theory to be true. They withheld the only affirmative proof.

Marcil was in the restaurant, let alone that he was by the back door.

B. The prosecution withheld evidence at trial which showed there was another criminal agent.

1. Trial: As has been noted, the prosecution's case rested on the claim that the assailant entered through the rear door after closing. This theory is significant in relation to the defense case because the defense established an alibi for Petitioner from a time prior to the restaurant's closing until shortly thereafter. In his summation the prosecutor told the jury that they could believe the alibi and still convict because, he claimed, the man entered after closing. He said "...it is still plenty of time, even believing the alibi, for James Breeden to do this job."

2. Withheld Evidence: (a)

Concealed statements given to the police by Lauri Heard, Rene Block, and Nancy Barbier, as well as Mrs. Porter, show that someone other than Petitioner hid in the restroom before, rather than after, closing.⁴ The restaurant was closed and the other man remained hiding in the restroom. It was in the restroom that he was later discovered by Richard Morefield when Richard went to clean it.

(b) Ms. Heard, Ms. Block and Ms. Barbier told the police that they saw a man enter the restroom just before closing. The man did not come out. At

⁴ These statements, with the exception of Ms. Heard's statement, were obtained for the first time in a state habeas corpus proceeding. Ms. Heard's statement was obtained in discovery in the federal habeas case on which this Petition is based. None of these statements were available at trial.

closing time they left and the doors were locked behind them. He had still not come out of the restroom. If he had come out they would have seen him.

(c) Mrs. Porter and her husband were talking with the manager in his office from before until shortly after closing. The office had a view of the front of the restaurant. When they left, the doors were unlocked for them to exit and were then locked behind them. They never saw the man leave.⁵

⁵ At trial the prosecution concealed the evidence of someone hiding in the restroom before closing. They had argued entry occurred after closing. When the evidence finally came out about someone hiding in the restaurant before it closed, the prosecution claimed that this evidence did not conflict with their case. The original trial prosecutor testified in the federal habeas hearing that these witnesses identified Petitioner in a lineup. That claim is in conflict with the facts.

The police provided forms for the

(d) Ms. Nakpodia was working at the front counter from closing until she was accosted by the assailant. She did not see any man leave after closing.⁶

witnesses who viewed the lineup to use when they made their selection. The police had no such forms for these witnesses. They did, however, have their statements about the man hiding in the restroom before closing. Their descriptions do not match Petitioner. These witnesses also contributed to a composite drawing prepared by an FBI artist. They described someone other than Petitioner.

Even if these witnesses had identified Petitioner at a lineup, they would still be exculpatory because they establish that someone hid in the restaurant before closing; the defense had an alibi for that point in time; the prosecution conceded the credibility of the defense alibi; and claimed that entry occurred after closing.

⁶ The federal habeas Court erroneously concluded that the jury, if given this evidence, could have concluded that the man was let out by another employee. Mrs. Porter saw no one leave. She contradicts this conclusion as does Ms. Nakpodia who was by the front counter near the doors until accosted by the intruder. She was by the front door the entire time and the doors were locked. No one left.

(e) Descriptions of the man who entered the restroom were given to the police by Ms. Block. She described the man as taller than Petitioner, i.e. 5' 11". He had brown hair. Petitioner clearly has black hair and is significantly shorter than the man described.

(f) Shortly after the crime the police circulated wanted posters with composite drawings of the suspect. They were based on descriptions from Barbier, Block and Heard. The hair color, brown, and the height, 5' 11" or taller, also matches the description given by Julie Nakpodia. These descriptions and composites do not match or depict Petitioner but they do describe the man who hid in the restroom before closing.

3. The Effect of the Withheld Evidence: The evidence the prosecution concealed at trial about Marcil's location at the back door and someone hiding in the restroom before closing combined with the evidence known at trial would have established that no one entered through the rear door after closing as the prosecution claimed. Someone hid in the restroom before closing. Moreover, that someone was described as looking different than Petitioner. That someone, when coupled with the prosecution's recognition of the validity of the alibi, established Petitioner's innocence.⁷

⁷ The prosecution in its summation made a significant effort to show the jury that "even believing the alibi..." there was plenty of time for Petitioner to have committed the crime. The prosecution concealed evidence contradictory to their case.

C. The prosecution withheld evidence at trial which showed that the initial identification of Petitioner was bogus.

1. Trial: At trial and in closing argument, the prosecution relied heavily on police testimony that the very first time Ms. Nakpodia saw a photograph of Petitioner she selected his picture from five others in a photo spread. Her identification was critical to the prosecution's case. She is the only one to place him at the scene. There was no physical evidence tying Petitioner to the crime.⁸ During pretrial hearings

⁸ There were various fingerprints found in the manager's office, on the kitchen entry and/or exit door and elsewhere which did not match any employee or Petitioner. In fact, there were 17 unidentified fingerprints and 3 unidentified palmprints. The most significant prints could have come from a shell casing found on the floor but the

regarding the validity of her claimed identification of Petitioner, the police even went so far as to say that she cried when she first saw his photograph. They also said she told them "she was almost 100 percent sure."

2. Withheld Evidence: Concealed by the prosecution, until the federal habeas case, were notes made by the officer who presented this photo spread to Ms. Nakpodia. This police report does not say Ms. Nakpodia cried when she picked out Petitioner's photograph. She did not say she was almost 100 percent sure. Indeed, it says she did not pick out his photograph at all. In fact, it says

police did not preserve it. No fingerprints of Petitioner were found anywhere. Ms. Nakpodia did not see the man wearing gloves.

"negative for I.D." as to Petitioner.⁹

She did not select Petitioner's picture the first time she saw it. She did not

⁹ The defense was unaware that the police had testified falsely about what they claimed was Ms. Nakpodia's initial identification of Petitioner until the federal habeas Court ordered the prosecution to produce discovery in the case now pending before this Court.

Although the federal habeas corpus petition did not specifically name this precise issue, a memorandum filed in support of the Petition, did address the issue of the validity of Ms. Nakpodia's claimed identification of Petitioner, as well as the issue of the prosecution's withholding of evidence which conflicted with its case. The issue, if not this specific, glaring example, was before the District Court in the initial pleadings.

Discovery on this issue was allowed by the lower court. It was also argued in a post hearing memoranda. In its final opinion, however, that Court indicated it would not consider any evidence not expressly presented in the initial Petition.

The lower Court should have considered this evidence as it is a critical piece in Petitioner's claim of trial by concealment.

pick out his photograph then or at any other time.¹⁰

3. The Effect of the Withheld Evidence. (a) Combining what the prosecution concealed at trial with what was known at the time of trial established

10 Ms. Nakpodia saw many photographs and could not remember what she saw without the photos being presented to her. In fact, she did not testify at trial about this photo spread. Moreover, it is believed that she also saw other photographs of Petitioner. This is based on the fact that the police risked taking color photographs of Petitioner from his sister-in-law without her consent or a warrant. These pictures, however, just months after the crime, were destroyed or lost by the police even though the police took extraordinary steps to preserve and keep safe everything relating to this case. They used a special file cabinet in a special office but they "lost" these color photographs. Another item inexplicably lost or destroyed was a photo spread in which Ms. Nakpodia selected a man named Mitchell as the assailant. It is believed that she selected Mitchell instead of Petitioner, but that cannot be established because that photo spread also disappeared without explanation within months of the offense.

that the identification of Petitioner was far from reliable. Prior to this bogus photo spread identification, Ms. Nakpodia had described the assailant as taller than Mr. Morefield when she saw them together coming from the restroom. Morefield was 5' 10" tall. Petitioner is shorter. She also said the man had brown hair. Petitioner has black hair. Once she said he had a moustache and on another time that he was clean shaven. Petitioner was clean shaven.

(b) On other occasions she selected other men from photographic spreads. Once she picked a man named Angel and another time a man named Mitchell.¹¹ (cf. note 10, supra).

¹¹ She eliminated Angel after seeing him in a lineup. The police eliminated Mitchell because he and his wife claimed that Mitchell was at home in bed when the crime occurred. The jury was improperly

(c) In its summation the prosecution placed greater emphasis on this bogus photographic identification than on their claimed lineup identification. They falsely said she selected Petitioner the first time she saw his picture. They had to get around the prior inconsistent descriptions and prior inconsistent photographic identifications.

(d) This emphasis on what is now known to be a false photographic identification is also due to the fact that Petitioner was the only person in the lineup whom the police had previously displayed to Ms. Nakpodia. After she had seen his photograph and failed to select it, the police did not show her any more pictures. She was brought from the

told that Breeden was also picked out in a photographic spread. We now know that to be false.

hospital and placed next to his position in the lineup. Her medical charts revealed that she was under large doses of medication when that lineup occurred.¹²

(e) With the false photographic identification, the validity of the lineup identification is questionable. The failure to select him prior to the lineup and her other misidentifications, establishes the unreliability of her identification.

D. The prosecution withheld evidence at trial which impeached the testimony of witnesses they called "significant".

¹² The defense was not able to show the original trial court that Ms. Nakpodia had not selected Petitioner's photograph from an array which included it at the time the defense sought to suppress the two identifications. That evidence had been concealed by the prosecution.

1. Trial: Because of the total lack of any physical evidence tying Petitioner to the offense, the prosecution called a witness named McGuire who claimed that he had been called by Petitioner to do a "job" on 5 March, the night of the robbery. He knew nothing about the "job" and did not go. 13

13 One other trial witness, Burns, said that he and Petitioner had earlier cased the restaurant for a two man robbery. He too refused to talk to the defense and even claimed the Fifth Amendment at a pretrial hearing. He and the prosecution denied any deals but he received the lion's share of a \$10,000.00 reward after trial. He also got probation for an armed robbery for which he was awaiting sentencing at the time of his testimony. The defense was able to unearth, before trial, a police cover-up of their fixing some cases for Burns in a neighboring jurisdiction. During the federal habeas litigation, it was learned that the police also helped Burns get employment. The prosecution had always adamantly insisted there were no deals of any kind with Burns. That was not correct.

2. Withheld Evidence: During discovery in the federal habeas case it was learned that the prosecution had concealed evidence at trial to the effect that McGuire had initially denied knowing anything when first interrogated by the police.

3. The Effect of the Withheld Evidence: He initially denied knowledge because he received no phone call before or the night of the offense. He had tied the claimed 5 March date of this supposed phone call to the dates when the women with whom he was then living had moved into their apartment. He said the date was weeks or months after the lease. The lease was dated 1 March so the call could not have been on 5 March, the date of the crime. The concealed denial, when added

to the lease conflict makes McGuire a non-credible witness.

II. THE OPINION OF THE DISTRICT COURT

The District Court, as previously noted, did not consider significant the prosecution's willful withholding of the only affirmative evidence conclusively establishing that there was someone right at the back door at the very time the prosecution claimed the intruder entered that door unnoticed. Likewise, that Court did not consider significant the fact that the prosecution concealed evidence directly conflicting with its claim that the intruder entered through a back door after closing, i.e. the concealed statements of witnesses, Barbier, Block, Heard and Porter (see Section A.2. and B.2. above).

In addition, the District Court refused to consider the prosecution's false evidence and argument regarding what they claim to have been the only eyewitness' strong and initial identification of Petitioner. Finally, the District Court would not consider the fact that the prosecution had also concealed that one of its key witnesses, McGuire, had initially denied having any knowledge about the case.

III. THE OPINION OF THE COURT OF APPEALS

The Court of Appeals, without formal briefs or argument, simply affirmed the lower court.

IV. REASONS FOR GRANTING THIS WRIT

A. The Prosecution Knowingly Relied Upon the Use of False Evidence.

A prosecution may not be based on the use of knowingly false evidence.

Napue v. Illinois, 360 U.S. 264 (1959);
Giglio v. United States, 405 U.S. 150
(1972). Not long ago when commenting on
this issue, this Court stated that this
sort of prosecutorial misconduct corrupts
the truth seeking process and is material
unless failure to disclose the falsity is
harmless beyond a reasonable doubt.
United States v. Bagley, 473 U.S. 667
(1985).

In the case sub judice, it is clear
that the prosecution was based on the
knowing use of false evidence. It was not
harmless beyond a reasonable doubt.

At hearings on the pretrial motions
to suppress and at trial, the police
testified and the prosecution's argued
to the jury that "...the very first time
she saw a picture of the killer of her
husband was on April 19..." when she was

show the photo spread with Petitioner's photograph and that she picked out Petitioner as the man saying it was he. (Trial, 2 November 1976 at 28). The truth is that the police notes of that photographic spread say "Negative for I.D. as to Petitioner. These notes were not available at trial. They were concealed until disclosed in the federal habeas case.

That which is known to the police is known to the prosecution. Rivers v. Martin, 484 F.Supp. 162, 164 (W.D.Va. 1980); Boone v. Paderick, 541 F.2d 447, 450-451 (4th Cir. 1976).

Given Ms. Nakpodia's descriptions which did not match Petitioner and her selection of the photographs of others such as Mr. Mitchell, this falsity of her

so-called strong and first identification of Petitioner is significant.

The public cannot have confidence in a criminal justice system in which prosecutions are allowed to reap the benefit of such false evidence. See e.g. Brown v. Wainwright, 785 F.2d. 1457 (11th Cir. 1986).

B. A Trial Is Not Fair and Its Result Is Not Just When the Prosecution Deliberately Withholds Evidence Which Conflicts With Its Case and Supports the Defense.

It has long been held that it is rarely justified for the prosecution to have, as they had here, exclusive access to a storehouse of relevant facts. Dennis v. United States, 384 U.S. 855, 857 (1966). After all, our adversary system

keep their cards concealed. Wardius v. Oregon, 412 U.S. 670 (1973).

In the case sub judice the prosecution willfully concealed from the defense and jury evidence which conflicted with its case:

(1) Mrs. Porter placed an employee at the prosecution's claimed point of entry at the claimed time of entry. It was not known at trial that he was there at that critical time.

(2) Ms. Block, Ms. Barbier, and Ms. Heard establish someone entering the restroom just before closing. They and Mrs. Porter along with Ms. Nakpodia establish that the man did not leave after he entered that restroom. At trial the prosecution claimed entry after closing. This contradictory evidence was unknown at trial.

This contradictory evidence was unknown at trial.

(3) Ms. Nakpodia, according to police notes, did not identify Petitioner in a photo spread even though the prosecution claimed she did and that her i.d. was sure.

(4) McGuire, contrary to his story at trial denied any knowledge of the case when first interrogated.

This evidence could have been used to prove the defense argument that someone, not Petitioner entered the restaurant before closing and hid in the restroom until discovered there by Morefield. The defense, without this evidence, could only argue a theory. The concealed evidence was the missing proof of innocence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX



APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-6053

JAMES L. BREEDEN,

Appellant,

versus

E. L. BOOKER, Warden

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (C/A No. 85-144-R)

Submitted: December 18, 1987
Decided: January 26, 1988

Before HALL, ERVIN, and CHAPMAN, Circuit Judges.

(Marvin David Miller, for Appellant.
Robert Homer Anderson, III, Frank Snead

Ferguson, Eugene Paul Murphy, Office of
the Attorney General of Virginia, for
Appellee

PER CURIUM:

A review of the record and the district court's opinion discloses that an appeal from its order refusing habeas corpus relief pursuant to 28 U.S.C. § 2254 would be without merit. Because the dispositive issues recently have been decided authoritatively, we deny a certificate of probable cause to appeal, dispense with oral argument, and dismiss the appeal on the reasoning of the district court. Breeden v. Booker, C/A No. 85-144-R (E.D. Va. Mar. 12, 1987).

DISMISSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JAMES L. BREEDEN,)	
)	
Petitioner,)	Civil Action No.
)	85-0144-R
v.)	
)	
E. L. BOOKER, et al.,)	
)	
Respondents.)	

JUDGMENT ORDER

For the reasons stated in the accompanying Memorandum this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be, and the same is hereby, DENIED.

Let the Clerk send copies of this Order and accompanying Memorandum to counsel of record.

/s/ ROBERT R. MERHIGE, JR.
DATE: MAR 12 1987 U. S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

JAMES L. BREEDEN,)	
)	
Petitioner,)	Civil Action No.
)	85-0144-R
v.)	
)	
E. L. BOOKER, et al.,)	
)	
Respondents.)	

MEMORANDUM

This matter comes before the Court on petitioner's application for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. After granting leave for the parties to conduct discovery, the Court heard a summary of the evidence in the case and oral argument on the merits. Having considered the matter, the Court is now ready to render its decision.

Background

In the early morning hours of March 6, 1976, a Roy Rogers restaurant located in Alexandria, Virginia, was robbed by a

single gunman. The man appeared in the restaurant shortly after closing; however, it is not known whether he secreted himself in a restroom or entered through the back door after the main entrances were locked. The man forced the remaining employees, together with an employee's husband, into a walk-in refrigerator before having the manager remove money from the restaurant's safe. After the manager joined the others in the refrigerator, the robber fired his gun repeatedly into the group. Only one of the five workers survived. That person subsequently identified the petitioner as the perpetrator.

After a jury trial in the Circuit Court of Fairfax County, petitioner was convicted of robbery, malicious wounding, and murder. Petitioner now seeks a determination that these convictions are

constitutionally invalid.

Merits

Petitioner contends that the prosecution withheld exculpatory evidence in violation of the due process clause of the fourteenth amendment. See Brady v. Maryland, 373 U.S. 83 (1963); United States v. Agurs, 427 U.S. 97 (1976). Specifically, petitioner alleges that statements given to the police by three persons who left the restaurant shortly before or after closing were favorable to petitioner but were not produced by the Commonwealth upon request.

After considering the matter, the Court determines that the withholding of these statements did not violate petitioner's due process rights and, accordingly, the petition will be denied.

1. The applicable standard

There are three distinct situations in

which the suppression of exculpatory evidence constitutes a denial of due process: (1) where the prosecution's case includes perjured testimony, and the prosecution knew or should have known of the perjury but failed to disclose that fact; (2) where the defense has requested but been denied specific evidence material to the issue of guilt; and (3) where the defense has made no request or only a general request for all exculpatory evidence. See Agurs, supra, 427 U.S. at 103-07; Chavis v. North Carolina, 637 F.2d 213, 222 (4th Cir. 1980). There is no allegation of perjured testimony in this case and thus the first situation need not be considered further.

With respect to the remaining situations, a determination that exculpatory materials have been suppressed does not compel the conclusion that a due

process violation has occurred. Where there has been a request for specific evidence, the defense must also demonstrate that there is a reasonable possibility that proper disclosure of the information would have affected the trial's outcome. See Chavis, supra, 637 F.2d at 223. Where no request or only a general request is made, the defense must show that there is a reasonable probability that disclosure would have altered the outcome. See United States v. Bagley, 53 U.S.L.W. 5084 (1985).

The parties here dispute whether petitioner made a specific or only a general request for the witnesses' statements in the discovery process preceding the jury trial. That issue need not be resolved, however, because the Court is satisfied that there is not even a reasonable possibility, the lower of the

two standards, that production of these materials would have affected the jury's verdict.

2. Analysis of the statements

It should be noted that the evidence produced at trial against petitioner was substantial. Samuel Michael Burns, an acquaintance of petitioner, testified that the two had planned to rob the Roy Rogers together and had visited the premises on prior occasions for that purpose. Additionally, Burns testified that petitioner owned a .32 caliber handgun, the same type of gun used in the commission of the crimes. Most importantly, Julie Nakpodia, the sole survivor of the shootings, identified petitioner as the perpetrator. Petitioner's defense was an alibi which, for the most part, only accounted for petitioner's whereabouts for the time

period just prior to the robbery. Consequently, petitioner bears a heavy burden in attempting to demonstrate a reasonable possibility that timely disclosure of the statements would have changed his trial's outcome.

Essential to an understanding of petitioner's arguments here is an explanation of the government's theory at trial with respect to the manner in which the gunman gained entrance to the restaurant. The evidence indicated two possibilities. First, the gunman may have secreted himself in the bathroom prior to closing and emerged sometime later. Second, he may have entered the restaurant after closing through the rear door which was left unlocked to permit the disposal of garbage. Petitioner's alibi witnesses accounted for his presence until shortly after closing. Consequently, if the jury

believed the alibi, it could convict petitioner only if it accepted the second alternative, that petitioner entered after closing through the rear door.

The three persons whose statements were not released to petitioner included two Roy Rogers employees, Nancy Barbier and Peggy Porter, and a customer, Renee Block. The statements generally concern the presence of various persons in the restaurant at closing or shortly thereafter.

The statements of Barbier and Porter indicate that at the time each left, the remaining employees were performing various duties incident to closing the restaurant: Pat Marcil was near the back door cleaning pots, Dennis Gildea was counting money at the manager's desk, Richard Morefield was cleaning the grill area, and Julie Nakpodia was restocking

the condiments at the front counter. The statements further indicate that Barbier and Porter left the premises at 12:10 a.m. and 12:15 a.m. respectively.

Petitioner contends that this evidence, which places the employees at various locations in the restaurant, rebuts the government's theory that the gunman entered through the rear door. Petitioner reasons that, because the workers would have seen the gunman enter, he would not have first appeared to Nakpodia emerging from the restroom area. Rather, he would have been confronted closer to the rear door area by an employee. Consequently, argues petitioner, this evidence indicates that the gunman must have secreted himself in the bathroom prior to closing.

Even if this Court accepted his argument, petitioner would not be entitled to relief on this basis. The principle

threat to due process presented by the prosecution's having concealed exculpatory evidence is that the jury is thereby precluded from considering evidence that might well have led it to reach a different result. See Agurs, supra, 427 U.S. 97. Here, however, Nakpodia testified at trial to the same essential facts contained in the undisclosed statements. She stated that Marcil was by the rear door, Gildea at the manager's desk, and Morefield in the restroom area when she first saw the gunman. Moreover, based on this evidence trial counsel for petitioner made the same argument in closing that is profered here. Accordingly, the jury itself has already considered petitioner's contentions. Therefore, petitioner's claims regarding the statements of Barbier and Porter are meritless.

The statement by Renee Block presents a different problem. Block stated to the police that she and three others entered the Roy Rogers at approximately 11:30 p.m., the night of the robbery. After receiving her food and sitting at the table, Block noticed two men who, although not together, appeared to be aimlessly wandering around the restaurant. Prior to leaving, she noticed that one of the men appeared to go into the restroom. She and her friends left minutes later and the manager locked the door behind them. At that time, the suspicious man had not reappeared.

Petitioner alleges that this statement and witness would have provided evidence of an alternative perpetrator for the jury. Petitioner further contends that there is a reasonable possibility that the evidence would have altered the verdict in

this case.

The Court perceives two problems with this contention. First, it appears that Block left the restaurant at approximately 12:00 a.m., half an hour before the gunman appeared. Block indicates in her statement that she left only a few minutes after the man entered the restroom. Therefore, it would be reasonable for the jury to believe that the man exited the restroom and was let out by an employee prior to the robbery.

The second, more significant, problem, is that Block subsequently identified the petitioner from a photo array as the man she saw enter the restroom. Consequently, petitioner's argument that Block was an exculpatory witness is ludicrous.

Petitioner argued at the hearing before this Court that by suppressing the witness, the Commonwealth foreclosed

petitioner from challenging the validity of Block's photo identification and using Block as a defense witness to support the theory of an alternative perpetrator. This argument is simply too tenuous. Petitioner has the burden of demonstrating that, at a minimum, there is a reasonable possibility that the outcome of the trial would have been different had the evidence been disclosed. Given the identification problem noted above, together with the speculative impact Block's sanitized testimony would have had on the jury, the Court is satisfied that petitioner has failed to discharge this burden.

As a final matter, petitioner appears to raise new grounds for relief in his post-hearing memorandum. To the extent these other claims were not raised in the original petition, they have not been considered by the Court.

For the reasons above stated, the petition for habeas corpus relief filed pursuant to 28 U.S.C. § 2254 will be denied.

An appropriate order shall issue.

/s/ ROBERT R. MERHIGE, JR.
U. S. DISTRICT JUDGE

Date: MAR 12 1987